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In the Supreme Court of the United States

OCTOBER TERM, 1979

NORTH AMERICAN SOCCER LEAGUE, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether evidence of the North American Soccer League's substantial authority and control of the labor relations of its member clubs is sufficient to support the Board's findings that (a) the League and its United States member clubs constitute joint employers and (b) the players for those clubs constitute an appropriate bargaining unit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 613 F.2d 1379. The decision and order of the National Labor Relations Board (Pet. App. 10a–24a) are reported at 241 N.L.R.B. No. 199 (1979). The National Labor Relations Board's underlying certification of the Union as collective bargaining agent for the professional soccer players (Pet. App. 25a–49a) is reported at 236 N.L.R.B. 1317.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a–9a) was entered on March 21, 1980. A timely petition for rehearing was denied on April 23, 1980 (Pet. App. 50a–51a). The petition for a writ of certiorari was filed on July 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 52a.

STATEMENT

1. The North American Soccer League Players Association (NASLPA) filed a representation petition seeking certification as the bargaining representative of all professional soccer players employed by the North American Soccer League and its constituent member clubs. The League opposed the NASLPA's request for a single League-wide unit, arguing that the

only appropriate unit was each single club (Pet. App. 27a). On the evidence summarized below, the Board found that the League and its member clubs were joint employers of the players on each team and that a single League-wide unit, excluding players employed by the Canadian clubs, was an appropriate unit for bargaining (Pet. App. 31a–32a).[1]

The League is a non-profit association comprised of twenty-four member clubs (Pet. App. 2a). All clubs are subject to the provisions of the League constitution, which governs membership in and the activities of the League (Pet. App. 28a). League regulations control the activities of the individual team franchises (*ibid.*). The commissioner of soccer is selected by the member clubs and has broad powers under the constitution and the regulations to enforce League requirements and to conduct the League's affairs (*ibid.*). The commissioner is assisted in the management of the League by a board of directors comprised of one representative from each club (*ibid.*). Through the League commissioner and its representative on the board of directors, each of the member clubs exercises an extraordinary degree of control over the labor relations of all other members.

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[1] NASLPA's representation petition sought certification as the bargaining representative of all players employed by the league and its member clubs, including the two existing Canadian clubs. But the League argued that if a League-wide unit was otherwise appropriate, the Board should decline to assert jurisdiction over the Canadian clubs (Tr. 986). The Board accepted the League's position on this point and declined to assume jurisdiction over the Canadian clubs, noting, *inter alia*, that players on those teams were subject to Canadian labor laws (Pet. App. 32a).

The basic relationship between a player and his nominal employer is established in the standard contract adopted by the club owners (Pet. App. 30a). Under the League's regulations, no club can permit any individual to play unless he has signed this standard contract (*ibid.*; Union Exhibit (UX) 7 Section 1.1). Although the individual clubs retain authority to modify the terms of the standard contract or to add new terms, any deviation from the standard contract must be approved by the commissioner (Tr. 183–184; UX 7 Section 1.2). Indeed, no contract is valid until approved by the commissioner (Pet. App. 30a–31a; UX 7 Section 1.5). The commissioner may disapprove any contract containing terms that are in his opinion contrary to the best interest of the League or if, in his opinion, either party has been guilty of conduct detrimental to the League or the sport (Pet. App. 31a; see Tr. 184; UX 7 Section 1.6).

Furthermore, under the contract players must comply with the provisions of the League constitution and regulations as well as the rules adopted and enforced by their individual clubs (Pet. App. 30a; UX 5 Sections 2.1, 2.2). Any player whose conduct the commissioner determines is detrimental to the League may be terminated by the commissioner (Pet. App. 30a; UX 5 Section 5.1). The commissioner resolves disputes between players and their clubs by final and binding arbitration (Pet. App. 30a; Tr. 418; UX 6 Section 11.4).

Soccer clubs may obtain players through the college draft, assignments of player contracts (trades), the waiver system, loans from teams outside the League, and the "free agent" system (Pet. App. 29a–30a; UX 7

Sections 2.1, 2.2, 3.1, 5).[2] As petitioners make plain (Pet. 13–17), because of the nature of professional sports, each team has an interest in the quality of the players on all other teams (see Tr. 425, 427, 430–431, 704–709). Both the college draft system and the waiver system are designed to "promote some degree of equality" in the distribution of player talent (Pet. 16–17). The League and, indirectly, all of the member clubs exercise substantial control over the player selection and termination process throughout the League. The commissioner conducts the annual college draft and sets forth the circumstances under which a college player may be signed to a professional contract (Pet. App. 20a; Tr. 233; UX 7 Section 5). The League carefully regulates the assignment or trade of player contracts. Any club that intends to assign a player contract must first file with the commissioner prescribed forms and provide him with certain other information (Pet. App. 29a; UX 7 Section 2.1). The kind of, and minimum, consideration in such a transaction is prescribed in League regulations (Pet. App. 29a; UX 7 Sections 2.7, 2.8, 2.14, 3.1(d), 8; Tr. 346, 356, 407). If, in the opinion of the Commissioner, the assignment agreement contains terms that are not in the best interest of the League or either party has been guilty of conduct detrimental to the League or the sport, the commissioner may disapprove the assignment (*ibid.*). The League also requires the assignee to adopt the

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[2] "A free agent is any player not under contract to any soccer Club, or who is on the free transfer list of any Club, concerning whom no Club has any valid claim permitted under these regulations" (UX 7 Section 10.6).

existing contract between the player and the assignor (Tr. 407; UX 7 Section 2.8).

The waiver system is used by the clubs to assign player contracts, to allow a player's contract to expire, or to terminate a player's contract (Pet. App. 29a; Tr. 350, 539, 714–715; UX 7 Sections 1.10(n), 2.4, 2.5, 3.1). The commissioner administers the waiver system and must approve the individual club's decision to terminate a player before the club puts the player on waivers (Pet. App. 29a–30a; Tr. 314–315, 317; UX 7 Section 1.14). The club must provide the commissioner with information prescribed in League regulations (UX 7 Section 3.1). If, in the opinion of the commissioner, the individual club's decision to terminate a player is not in the best interest of the League, he may disapprove the termination (Pet. App. 30a; Tr. 313–314; UX 7 Section 1.14).[3]

Although the League and its member clubs have not yet found it necessary to establish detailed regulations to govern the acquisition of players by loan or through the free agent system, all players without regard to the way in which their services are acquired must sign the standard League contract (Pet. App. 30a; UX 7 Section 4.15). Loans among member teams are flatly prohibited (Pet. App. 30a; Tr. 297–298). Players often become "free agents" through contract termination or

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[3] Petitioners note (Pet. 17 n.30) that the commissioner has never exercised his power to overrule an individual club's decision to terminate a player, but the commissioner's supervisory authority and power to control are sufficient in this context. See, *e.g.*, *The Southland Corp.*, 170 N.L.R.B. 1332, 1334 (1968).

expiration, both of which, as noted above, are carefully regulated by the League (Tr. 319–320, 566, 714–715).

Thus, the League and, through it, the member clubs exercise substantial control over the terms and conditions of employment of all players in the League as well as the tenure of employment of all players in the League. In addition, the commissioner negotiates a single network television contract on behalf of all the member clubs, who share equally in the revenues received under the contract (Pet. App. 28a; see Tr. 162–163; UX 6 Sections 13.1–13.5). The commissioner also prepares the schedule of games based on information provided by the clubs, employs and trains game officials, and decides protested games without appeal (Pet. App. 28a; Tr. 163, 226–227; UX 6 Section 5.6(b), (c), (e)). The League staff administers a transportation expense system under which all clubs share equally in the transportation expenses of all players (Pet. App. 28a; Tr. 211, 538–539; UX 7 Section 6.17), and is responsible for directing national public relations and promoting soccer (Tr. 162).

On these facts, the Board, while recognizing that individual clubs enjoy a "considerable degree of autonomy" in operating their respective teams on a daily basis, found that the League and each of its member clubs exercise a substantial degree of control over the labor relations of all the clubs. The Board concluded that (1) the League and its member clubs constitute joint employers and (2) the players of the United States based clubs constitute an appropriate bargaining unit.

On the first point, the Board concluded (Pet. App. 31a; footnote omitted):

> Considering all the circumstances herein, we agree with the Petitioner that the League and the individual clubs are joint employers of the players on each team. We have long held that "the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other." Although, as discussed below, the individual clubs operate their respective teams on a daily basis with a considerable degree of autonomy, it is clear from all of the foregoing that the League, through the commissioner, exercises a significant degree of control and influence over the clubs, including the terms and conditions of employment of the players. We therefore find that the League and the clubs are in a joint-employer relationship.

In finding a League-wide unit to be appropriate (but excluding the Canadian teams) the Board explained (Pet. App. 37a–38a):

> * * *The clubs have given the commissioner the authority to enforce and police the governing documents of the League. Pursuant to those governing documents, the clubs have set forth standards by which they wish to abide, including provisions governing the employment relationship between players and clubs. While it is clear that each club has the freedom to negotiate the terms and conditions of employment of a player, including his salary, fringe benefits, and special provisions, it is equally clear that the commissioner has the power to disapprove those items under certain circumstances which are clearly left to his discretion. In addition, the standard player contract, the

> regulations, and the testimony of the deputy commissioner make it obvious that the player's contract is in no way valid unless and until it has received the approval of the commissioner.
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> * * *[I]t is clear that the League, through the commissioner, exercises a substantial degree of control over the individual clubs, including the terms and conditions of employment of the players, so much so in fact that it would be difficult to imagine any degree of stability in labor relations if we were to find appropriate single-club units. This is especially true in light of the fact that the clubs have joined together in a single association which controls, in many areas, their operations.

Players in the unit voted in favor of representation by the NASLPA and thereafter it was certified as exclusive representative of the unit employees. Upon the League's refusal to bargain, the NASLPA filed unfair labor practice charges against the League and its clubs (Pet. App. 18a).

The Board, on summary judgment, held that the League and its clubs violated Section 8(a)(5) and (1), 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the NASLPA (Pet. App. 18a). The Board ordered the League and its constituent member clubs to bargain, upon request, with the NASLPA (Pet. App. 21a–22a).

2. The court of appeals enforced the Board's decision that the League and its member clubs are joint employers, and that a collective bargaining unit comprised of all League players of clubs based in the United States is appropriate (Pet. App. 1a–2a).

The court stated (Pet. App. 3a; footnote omitted):

> The settled law is not challenged on this petition for review. Where an employer has assumed sufficient control over the working conditions of the employees of its franchisees or member-employers, the Board may require the employers to bargain jointly.

Quoting *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964), the court noted that determination of the joint employer issue is "essentially a factual issue." And the court concluded that substantial evidence supports "the Board's finding that the League exercises a significant degree of control over essential aspects of the clubs' labor relations, including but not limited to the selection, retention, and termination of the players, the terms of individual player contracts, dispute resolution and player discipline" (Pet. App. 4a).

Noting that "each soccer club exercises through its proportionate role in League management some control over the labor relations of all other clubs" (Pet. App. 7a), the court also agreed with the Board that "each club granted the NASL authority over not only its own labor relations but also, on its behalf, authority over the labor relations of the other member clubs"[4] (Pet. App. 4a).

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[4]The court rejected the League's contention that the exclusion of the Canadian clubs rendered the joint employer finding encompassing 21 clubs inconsistent with the existence of a 24-club League. The court noted that the League had argued against the inclusion of the Canadian clubs in the Board proceedings and that the Board's decision not to exercise jurisdiction over the Canadian clubs was not before the court on appeal (Pet. App. 6a).

The court also approved the Board's unit determination, explaining that (Pet. App. 8a):

> [T]he facts successfully refute any notion that because the teams compete on the field and in hiring, only team units are appropriate for collective bargaining purposes. Once a player is hired, his working conditions are significantly controlled by the League. Collective bargaining at that source of control would be the only way to effectively change by agreement many critical conditions of employment.

3. The court denied the League's petition for rehearing. Mr. Justice Powell thereafter denied the League's application for a stay.

ARGUMENT

Petitioners essentially quarrel with the Board's finding, upheld by the court of appeals, that the League exercises substantial control over the teams' labor relations and players' working conditions and that the teams share control over each other in these areas. The only issue raised by these contentions is whether substantial evidence supports the Board's findings, an issue which does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 479 (1951); *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503 (1951); see also *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 803–804 & n.5 (1976).

1. The question of joint employer status is one of fact to be determined primarily by the Board and, as the court of appeals correctly stated, is based upon

whether the purported joint employer possesses sufficient control over the work of the employees of the other employer to qualify as a joint employer. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964). The courts of appeals have consistently upheld the Board's finding of a joint employer relationship where a licensor has substantial control over the labor relations of a licensee. *NLRB* v. *Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966), cert. denied, 385 U.S. 1008 (1967); *Gallenkamp Stores Co.* v. *NLRB*, 402 F.2d 525, 530–532 (9th Cir. 1968); *S.S. Kresge Co.* v. *NLRB*, 416 F.2d 1225, 1229 (6th Cir. 1969). Cf. *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1165 (5th Cir. 1970).[5]

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[5] Petitioners assert that "[u]nder the Act, no employer may be subjected to a unit determination with respect to a group of people whom it does not employ" (Pet. 28–29). Since the Board found that the League and its member clubs constitute joint employers of all players, this statement apparently is intended to suggest that an employment contract of some sort is necessary. Petitioners cite no authority for that proposition, and their attempt to distinguish the long line of authority to the contrary is unavailing.

Thus, while the court in *Checker Cab Co.* did state that the facts before it were *sui generis*, 367 F.2d at 696, the facts the court found to be "'sufficient indicia of control' to warrant the joint employer finding of the Board," (*id.* at 698), are present in this case. As in *Checker Cab Co.*, the ostensibly separate employers in the League have set up joint machinery for hiring employees, for establishing rules of conduct, and for disciplining employees who violate the rules so established.

Petitioners err in stating (Pet. 23) that the Board overruled *Checker Cab Co.* in *Greater Houston Transportation Co.* (*Yellow Cab*), 208 N.L.R.B. 1020 (1974). Both cases stand for the principle that where individual members of an association give the association authority to intervene or permit intervention by other members into its employment practices the Board will find a joint employer relationship. In *Greater Houston*, *supra*, 208

The record evidence summarized above supports the Board's finding of joint employer status. As the court below noted, the League's control over the college draft and waiver system gives it a "significant" degree of control over "selection, retention, and termination of the players" (Pet. App. 4a–5a). The provision requiring clubs to obtain League approval over changes in the standard contract gives the League substantial control over working conditions. Disputes between players and clubs are submitted to the commissioner for binding arbitration. Moreover, the League itself "has broad power to discipline players* * *" without

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N.L.R.B. at 1021, however, the Board found that the purported joint employer "has no voice or control over wages, hours, and working conditions established by the franchisees and independents."

In *Gallenkamp Stores, Co., supra,* the court, in determining that a licensor and its licensees comprised a single storewide unit, did not find, as petitioner would have it, that the licensor exercised total control over its licensees, but found, instead, that it exercised only substantial control—for example, hiring was done by the licensees—and that the licensees had authorized such control over themselves and each other, as in the instant case.

In *Zayre Corp., supra,* the court sustained the Board's findings that in light of prior bargaining history a unit of less than all of the employees that the particular employer had contractual authority to control was appropriate and remained appropriate notwithstanding changes implemented by the employer's successor. 424 F.2d at 1165–1166. The court specifically noted that "the fact that one unit is appropriate does not necessarily mean that all other units are inappropriate." *Id.* at 1165. Indeed, the Board in *Zayre Corp.* also noted that a larger unit might be appropriate. *Id.* at 1165 n.12, quoting *Zayre Corp.,* 170 N.L.R.B. 1751 (1968)

regard to the particular clubs for which they play (Pet. App. 6a).[6]

Petitioners argue (Pet. 20) that the evidence fails to establish any control over labor relations between clubs, even assuming *arguendo* there is such control between the League and each individual club. As the court of appeals noted, however, each soccer club exercises such control by its proportionate role in League management. *Greenhoot, Inc.*, 205 N.L.R.B. 250, 251 (1973), on which petitioners rely is inapposite. There, while the management contract created a joint-employer relationship between the management company and each building owner with whom it had a contract, there was, as the court of appeals noted (Pet. App. 6a), no evidence that any of the building owners exercised any control over the activities of any other owner through the management company.

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[6]The cases relied upon by petitioners (Pet. 18) for the proposition that "[i]mposition of operational standards by a franchisor * * * upon franchisees * * * is not a basis for making a franchisor a joint-employer with its franchisees" do not suggest a similar result here. In *S.G. Tilden, Inc.*, 172 N.L.R.B. 752, 753 (1968); *Disco Fair Stores, Inc.*, 189 N.L.R.B. 456 (1971); *The Southland Corp.*, 170 N.L.R.B. 1332, 1334 (1968), the Board found that despite imposition of various operational controls over retailing practices, the franchisor reserved no control over labor relations. Here it was the League's control over labor relations which was dispositive. *Columbus Green Cabs, Inc.*, 214 N.L.R.B. 751 (1974), did not involve a joint-employer issue; the issue there was whether the cab company drivers were employees or independent contractors. In *California Commercial & Professional Exchange, Inc.*, 209 N.L.R.B. 104 (1974), the Board found that four employers who had no control over each others labor relations did not constitute a single employer by virtue of close family relationships. *Id.* at 104 n.3.

2. There is no merit in petitioners' contentions (Pet. 7–9, 13) that the Board's unit determination is incompatible with either the "star system" of remuneration or the fact of competition between teams. Petitioners' argument about the "star system" applies as much to collective bargaining in a single-employer unit as in a joint employer unit, for the gist of the argument is simply that the employer negotiates with individual players based on their skills. In any event, collective bargaining is not necessarily incompatible with the demands of a "star system." Collective bargaining is well-established in the entertainment industry,[7] and nothing in the Act prevents parties to a collective agreement from negotiating, for example, a floor on wages while allowing for much higher wages for stars. Petitioners' assertion that the competition that exists between them renders group-wide collective bargaining inappropriate is belied by the substantial authority over their operations which the teams have given to the League and to each other through their representative positions in League management. Collective action by the players is no more incompatible with that competition than collective action by the teams' managements.

Petitioners also contend (Pet. 25–27) that the players of the various clubs do not share a sufficient community of interest to justify grouping them in a league-wide unit. The court of appeals found that "the facts successfully refute any notion that because the

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[7] See, *e.g.*, *Buckley* v. *American Federation of Television & Radio Artists*, 354 F. Supp. 823, 848 (S.D.N.Y. 1973), rev'd 496 F.2d 305 (2d Cir.), cert. denied, 419 U.S. 1093 (1974).

teams compete on the field and in hiring, only team units are appropriate for collective bargaining purposes" (Pet. App. 8a).[8] This factual finding does not warrant review by this Court.

Nor is there any merit in petitioners' assertion that the Board failed to make the requisite findings on the issue of the appropriateness of the unit. As the court of appeals noted (Pet. App. 7a), in making the unit finding, "the Board expressly incorporated the reasons underlying its finding of a joint employer relationship." The control which the clubs have accorded to the League over their labor relations and the uniform standards imposed by the League are relevant to both the finding of joint-employer status and that of appropriateness of a league-wide unit.

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[8] As shown above, the record establishes that the players are recruited in a similar manner by all teams; all players are required to sign a standard form League contract; all are required to abide by the League constitution and rules and regulations, which encompass matters such as discipline, waivers for trades and terminations, player loans, free agents, and player eligibility. In addition, club rules established by individual clubs, relating to matters such as the type of home playing field, affect players from all visiting teams. Players on all teams are therefore bound together by concerns regarding League-wide working conditions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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